UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAR 10 1969

CAROL J. WINTHAL,
MARTIN J. WINTHAL,

Appellants,

versus

MANLEY BOWLER,

Appellee.

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MAR 1 1969

No. 22,808

CAROL J. WINTHAL,
MARTIN J. WINTHAL,

Appellants,

versus

S. A. BERRYMAN, ROSS DUNLEVY, and
STANLEY FOGLER,

Appellees.

FILED
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APPELLANTS' OPENING BRIEF

On Appeal from the United States District Court for the Northern District of California

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APPELLANTS' OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The complaint sets forth three claims and injunctive relief is sought in this civil rights action based on 42 USC 1983, 28 USC 1331, and 1343. The city and county defendants await trial under the first claim and no issue is presented as to those defendants.

The District Court dismissed the second claim as to the federal

injunction should not issue as to the state defendants. This Court has jurisdiction of the appeals under 28 USC 1291-2.

STATEMENT OF THE CASE

Facts

Preliminary Statement

The dismissal as to Bowler is inextricably bound together with liability of Smythe, and Kamp, other state employees, because the District Court has declined to rule on the latter two motions to dismiss pending determination as to Bowler only. Because of this fact and because the unconstitutional state statute [Cal. Penal 3064] bears strongly upon the propriety of the issuance of a permanent injunction, appellants will discuss the facts under the specifications of error in two categories: First, as to Bowler and his state agents, and finally, as to the activities of the federal defendants.

Questions Involved

1. Constitutionality of the California "fictional fugitive statute" [3064 Penal Code] which presumes fugitivity and criminality from an ex parte suspension or revocation of parole, as lacking a rational connection between the fact presumed and the fact proved. This question is raised in connection with the propriety of a permanent injunction to enjoin Bowler (cf. Zwickler v Koota, as District Attorney, County of Kings, 389 US 241, 249, 88 S Ct 391).

2. Is Bowler required or mandated to hold a "parole revocation court" at which the alleged violator is accorded the right to appear personally with counsel, because Bowler's actions involve a deprivation of liberty just as much as did the original criminal action? This question arises as concomitant with injunctive relief based on "unauthorized action under color of state law" by appellee Bowler. (Cf. Combs v La-Valee, 36 LW 2468).

3. Whether California's indeterminate sentence law [1168 Penal Code] delegating to the executive branch parole authority absolute discretion, uncontrolled by standards or directions of any kind, to impose a life sentence, violates the Due Process Clause of the Fourteenth Amendment? This question springs from the propriety of injunctive relief based on "unauthorized action under color of state law" by appellee Bowler. (Review has been granted in a related case: Conway v Adult Authority, No. 974 [211 Misc.] O. T. 1968.)

4. Whether failure of the District Court to render findings or conclusions of law, although requested to do so, permits its judgment of dismissal as to the federal defendants to be labeled "interlocutory" or whether activities of federal defendants here is distinguishable from Bell v Hood, 327 US 678? This question springs from the dismissal based on Rule 12b, shown in the record at pp. 105-6.

5. Is the California doctrine that a prisoner has no right of privacy constitutionally viable? Denial of injunctive relief was based

on the California Attorney General's position [Tr. 90], "a prisoner has no right of privacy" citing People v Lopez, 60 Cal2d 233, 248, and People v Morgan, 197 CA2d 90, 93.

SPECIFICATIONS OF ERROR

1. The Court erred in dismissing the permanent injunction proceedings, and discharging the order to show cause, without findings and conclusions of law.

2. The Court erred in dismissing the action as to Bowler under Rule 12 (b), and erred in staying proceedings as to Smythe and Kamp, other state agents, pending disposition of the appeal as to Bowler.

3. The dismissal as to the federal defendants [Tr 105-106] without findings of fact and conclusions of law, was erroneous.

ARGUMENT

1. In suits to enjoin official conduct, the provisions of 42 USC 1983 are fully applicable. Zwickler v Koota, 389 US 241, 249-251, 88 S Ct 391. The complaint alleged sufficient irreparable injury to justify equitable relief, and abstention was improper. The court below should have decided the constitutionality of the statutes [3064 and 1168. Calif. Penal Code]. Landry v Daley, 288 Fed. Supp. 200.

2. The statutory presumption set forth in section 3064. Calif. Penal Code, of fugitivity and criminality inferred from an ex parte suspension or revocation of the parole of any prisoner is unconstitutional

for lack of a rational connection between the fact presumed and the fact proved. In Tot v United States, 319 US 463, 63 S Ct 1241, the Court, relying on a line of cases dating from 1910, reaffirmed the limits which the Fifth and Fourteenth Amendments place "upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. Judged by this standard, the statutory presumption in statute 3064 is constitutionally infirm. Cf. U.S. v Romano, 382 US 136, 86 SCt 279.

3. Since Mempa, 389 US 128, requires a lawyer at every stage, appellee Bowler is required, if not mandated, to hold a "parole court" where the alleged violator is given the right to appear personally with counsel, because Bowler's actions involve a deprivation of liberty just as much as did the original criminal action.

Here the relevant facts which triggered the revocation were so capriciously and arbitrarily determined that, in effect, the inmate is deprived of equal protection of the laws. Caprice is further suggested by the retroactive suspension without notice. Cf. Campbell v Pate, CA-7 9/13/68. Also, the Supreme Court of Pennsylvania finds "completely untenable" the distinction, for right to counsel purposes, between a probation revocation and a parole revocation hearing. Comm. v Finson, 1/15/69, 4 CrL 1070.

4. The California indeterminate sentence law which prohibits the court in imposing sentence from fixing the "term or duration of the period of imprisonment" [Penal Code 1168] is unconstitutional.

The statute delegates to the executive branch parole authority absolute discretion, uncontrolled by standards or directions of any kind, to impose a life sentence, and violates the due process clause of the Fourteenth Amendment. Cf. Conway v Adult Authority, No. 974 [211 Misc.] October Term, 1968.

Cast in terms of denial of equal protection, the statute permits the facts on which appellee Bowler acted to be unreliably determined, hence parole is never considered afterward, merely the date changed annually. Cf. Campbell v Pate, CA-7, 9/13/68.

5. The denial of injunctive relief against Bowler was based in part on the California Attorney General's position [Tr. 90], that "a prisoner has no right of privacy" citing People v Lopez, 60 Cal2d 233, 248, and People v Morgan, 197 CA2d 90, 93. However, these pre-Katz [389 US 347] cases are not controlling. The crucial fact now, is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker. To claim, as the California Attorney General does, that one party can waive the Fourth Amendment rights of another is the same thing as saying that Katz would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. It is unbelievable that such a meaningless

form of consent would have rendered the defendant's overheard statements any more admissible in Katz. Cf. U.S. v Baker, 401 Fed2d 958, 978; U.S. v Clifford Jones, 9/30/68, 4 CrL 3007; U.S. v. White, CA-7, 4 CrL 2317.

6. The dismissal as to the federal defendants [Tr 105-106] without findings of fact and conclusions of law, was erroneous.

The court below grounded the dismissal on Rule 12 (b) as shown in the record at p. 106, line 6. However, "to act under color" of law does not require that the defendant be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents. Any other conclusion would establish an artificial distinction between the "under color" concept in 18 USC 242 and its civil counterpart, 42 USC 1983. Appellants contend that the meaning is the same in both statutes.

How far can a person, not a state agent, insinuate himself with state agents whose conduct is said to violate the Fourteenth Amendment. and not be recognized as a joint participant in the challenged activity?

Appellants contend the federal defendants' activity cannot be considered "purely private" on authority of Evans v Newton, 382 US 296; Smith v Allwright, 321 US 649; Terry v Adams, 345 US 461; Williams II, 341 US at 99-100; and note, concurring opin., of Harlan in Peterson v City of Greenville, 373 US 244, or Burton v Wilmington Parking Authority, 365 US 715, all involving "joint participants."

Appellants' keystone is Bell v Hood, 327 US 678, and Dow v Baird, 389 Fed2d 882.

The motion to dismiss provided by Rule 12 (b) (6), wielded by the federal defendants, is not a surreptitious reincarnation of the former general demurrer which was abolished by Rule 7(c). That abolition meant what it said. Dennis v Village of Tonka Bay, 151 Fed2d 411; Musteen v Johnson, 133 Fed2d 106.

See also Land v Dollar, 330 US 731, 735, cited with approval in Brown v Brown, 368 Fed2d 992; Cohen v Norris, 300 Fed2d 24; and Lucero v Donovan, 354 Fed2d 16.

A fair appraisal of the judgment of dismissal below, grounded upon the absence of a debatable constitutional issue, and no other construction is possible of the court's judgment, according to attorneys for the federal defendants, in light of the fact that the entire record is now before this Court, it should, on its own motion, certify the Bell v Hood [327 US 678] question, pursuant to the Revised Rules of the Supreme Court of the United States (Part VI, Jurisdiction of Certified Questions, Rule 28, subd. (1) and (2), and this brief should be treated as a request or application therefor, or, in the alternative, this Court has the power to certify such question "on its own motion" (subd. 2, Rule 28, supra), and to send the entire record to the Supreme Court so certified. In any event, failure of the District Court to state any theory of decision in entering the dismissal, is no basis for overruling Brown, Cohen, Lucero, and other cases in this circuit. Cf. Land v Dollar, 330 US 731, 735.

CONCLUSION

For all of the foregoing reasons, the judgments should be reversed.

Respectfully submitted,

NERI RAMOS
Attorney for Appellants

Certificate of Service by Mail

State of California,)
) ss.
County of San Francisco.)

I, the undersigned, depose and say:

I am a citizen of the United States, over eighteen years of age, and not a party to the within appeal; that on March 1, 1969, I served a copy of the within Appellants' Opening Brief on the Appellees, by placing a true copy thereof in an envelope with adequate first class postage thereon, addressed to appellees' counsel addressed as follows:

Jerry K. Cimmett
Asst. U.S. Atty.
450 Golden Gate Ave.
San Francisco 94102

Karl S. Mayer
Deputy Atty. Gen'l.
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and I placed the said envelopes in a postoffice box located at 7th Street and Mission Street, San Francisco, California.

Jo Ann Lyons

Subscribed and sworn to before me,
this 1st day of March, 1969.

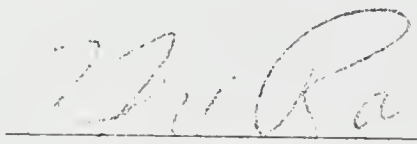
SEAL JAMES H. DUANE

Notary Public in and for said County and State.

JAMES H. DUANE
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.



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